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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 897

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 906

LACLEDE STEEL COMPANY, KRIM-KO CORPORATION, SCHALLER STEEL WORKS, INC., B & H, INC., STEWART-DURAVAN COMPANY, CLOAR GLASS COMPANY, INC., CLAUDE A. STAATS & SON, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (DB A1-A26)[1] is reported at 322 F.2d 698.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1963. Petitions for rehearing were denied on December 13, 1963 (DB A55). The petition of the Dock Board (No. 897) was filed on March 9, 1964, and that of the lessees (No. 906) was filed on March 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a condemnation commission's valuations, which had been adopted by the district court, were clearly erroneous because the commission ignored the fact that prior to the condemnation a major portion of the property had not been leased and was available at low rentals.

2. Whether the landowner, which had originally purchased the property from the United States, was entitled to recover interest on that portion of the condemned property's value which represented its yet unpaid purchase price.

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[1] The Board of Commissioners of the Port of New Orleans is commonly known as the "Dock Board." Reference to its appendix will be "DB A—." Reference to the petitions will be "DB Pet." and "Lacledé Pet." "R." references are to the printed record in the court of appeals.

3. Whether lessees who were forced to pay higher rentals on similar space after the condemnation were entitled to be compensated at the increased rate if the increase was attributable to the act of condemnation.

4. Whether the court of appeals' other rulings regarding proper valuation were correct.

STATEMENT

Petitioners owned interests in the Michoud Industrial Facilities Company, New Orleans, Louisiana, which was required by the United States for the construction of tank engines during the Korean conflict. The acquisition was in three stages: the first was effective on May 1, 1951 and was for temporary use only; an amendment in February 1952 condemned the entire term of all existing leaseholds (some of which were for as long as 25 years); and an amendment on December 23, 1952, condemned the full interest in the property (DB A2).

A brief history and description of the property was provided by the court of appeals (DB A2-A4):

> The property, consisting of 1,000.22 acres of land and improvements, while within the city limits of the City of New Orleans, abutting on the United States Highway 90 from New Orleans to Mobile, is approximately 13 miles east from downtown New Orleans. Much unimproved and undeveloped land lay between the built-up city and this tract. It is bounded by two canals, the Intracoastal Canal on the south and the Michoud Canal on the east. It is served by rail connections, with the main line of the Louis-

ville and Nashville Railroad at the extreme northeast side of the property. The tract was originally acquired by the United States in 1942 on behalf of the Defense Plant Corporation for the construction of a shipyard. At that time the land was marshy and subject to tidal overflow, but it was filled and graded and drainage was provided. The industrial plant, which had cost the United States approximately $17,721,000 was completed in 1944. During the period of construction the purpose of the plant was changed from ship building to the fabrication of aircraft. This effort was equally abortive and no aircraft were built, so that by the end of the Second World War the plant stood as a monument to the inefficiencies of waging a war which requires tremendous industrial construction before production of war essentials can be undertaken.

At the end of the War, the property was declared surplus. Extensive efforts were made to dispose of it without success. In November, 1947, it was sold, together with all machinery, equipment, tools, furniture, fixtures, and other personal property located thereon, to the Board of Commissioners of the Port of New Orleans, which, for convenience, we refer to herein as the "Dock Board."

The contract of sale called for the payment of $9,506,541, with no cash down, and the total consideration to be paid only from rents and profits which the Dock Board might receive for fifteen years. The property consisted of 22 buildings and 16 other installations, including some trackage, sewerage facilities, airplane runways, docks, parking lots, etc. The buildings themselves covered approximately 50 acres. Much the largest

and most important facility was a main manufacturing building more than a quarter of a mile in length, with ceiling heights from 48 to 55 feet. Other important buildings were a two-story administration building, 837 feet long, and a two-story engineering building, 1157 feet long.

The Dock Board made extensive efforts to lease the Michoud Facilities but was unsuccessful (*e.g.*, R. 827-828, 832-834). It entered into various leases for portions of the facilities for different terms varying from month to month up to 25 years in duration. Rental rates were from 18¢ to approximately 34¢ per square foot, with most of the space carrying a rental rate of 20¢ a square foot (R. 603). Most lessees installed fixtures and equipment, including, in some instances, power and light, water lines, general wiring, heating units, air conditioning and construction of office facilities. On May 1, 1950—a year prior to the date of taking—and on October 1, 1950, there were some 1,713,600 square feet of space for rent at the plant (*e.g.*, R. 841-842). As of May 1, 1951—the date of the taking—1,767,069.63 square feet of the total of 2,063,747 square feet of space was unleased (R. 513-514, 539; DB A4). About 85 percent of the main manufacturing building was vacant and unleased on that date (R. 842). In the office and engineering buildings the vacancy rates were over 77 and 90 percent, respectively (R. 842-843). Similarly, over 95 percent of the open land areas was then vacant and unleased (R. 843).

Over the United States' request for a jury trial, the district court referred the issues of just compen-

sation to a commission (R. 269). The commission held hearings and filed a report in which it awarded compensation to petitioners in the following manner: With respect to the Dock Board's interests, the commission determined that the rental value of the building space on December 23, 1952, was 60¢ annually per square foot (R. 526). It capitalized the anticipated income from the property at this rental, and thereby arrived at the compensation due for the taking of full ownership of the building (R. 526). It determined that the fair market rental value of the unleased space between May 1, 1951, and December 23, 1952, during which time the United States had taken only the leasehold interest, was 54¢ annually per square foot (R. 539). It valued the open land at a "weighted average value" of $8,391 per acre (R. 524) and determined its rental value by assuming that it would bring an 8 percent annual gross return (R. 538). The total award to the Dock Board came to more than $16,500,000 (R. 595-596). The lessees' interests were valued at annual rates of 45¢ or 56¢ per square foot (depending on whether they were located in the office or manufacturing buildings), and the value of improvements and other specialized advantages were added to this figure (R. 586). The total lessee's awards were more than $700,000 (R. 595-597).

The government filed objections to the commission's report, and these objections were overruled (R. 640-642). Thereafter, the district court entered final judgment in which it adopted the commission's re-

port (R. 661). On the government's motion, the United States was permitted to participate in the Dock Board's award to the extent of its vendor's lien —approximately $9,400,000—so that interest was ordered only as to the excess over that amount.

The court of appeals reversed the judgment of the district court. A majority of the court concluded that it was "plain from reading the 255 page report" of the commission (DB A7) that the commissioners had disregarded the fact that from 85 to 95 percent of the building space was vacant and available at an annual rental of 20¢ per square foot just before the taking. The court said that this rental price "would * * * be the best proof of the going market value as of the time the last leases were made in January" (DB A9). Since both the leasehold and fee interests on the building had been valued on the basis of conclusions which had ignored this factor—which the court called "one of the most important elements of the value" of the property (DB A10)—the building space awards were held to be clearly erroneous. Similarly, with respect to the vacant land, the court held that the commission had erroneously ignored the rentals at which this land was being offered unsuccessfully prior to January 1951, by assessing it at twice or triple such rental (DB A12-A13). The court also held, additionally, that the commission had erred in valuing the buildings and land separately and then adding the two together (DB A16-A17), and in computing the land rental by assuming that the property would return 8 percent of its total value annually

(DB A17). It also reversed the lessees' judgments on the ground that the commission had disregarded the 20¢-per-square-foot rentals which some of them had paid and the fact that most of the building space was still available at that rental prior to the taking (DB A19-A22). On the Dock Board's cross-appeal for interest on the $9,400,000 which had been deducted by the district court, the court of appeals affirmed the district court's disposition, observing that the court "had the authority to distribute the award to the parties who had an interest in the property" (DB A23).

ARGUMENT

The major issue in this case is the correctness of the court of appeals' conclusion that, in these particular circumstances, the commission erred in disregarding a significant consideration bearing upon the issues of just compensation. This decision of the court of appeals, which, we believe, was clearly correct and is sustained by the record, is of no general importance and does not merit further review. Nor do the subsidiary questions warrant this Court's consideration.

1. The court of appeals held that the commission's awards were clearly erroneous because the commission had ignored the fact that major portions of the condemned property had been unsuccessfully offered for rental at a rate which was approximately one-third of that awarded by the commission. This holding was consistent with the well established principle

that actual transactions made with respect to the very property being valued are the best evidence of the property's value. See, *e.g.*, *Baetjer* v. *United States*, 143 F. 2d 391, 397 (C.A. 1), certiorari denied, 323 U.S. 772; *Bailey* v. *United States*, 325 F. 2d 571 (C.A. 1).

The availability of property similar to that held by the lessees at a rental equal to that paid by the lessees also is a significant element in determining the "true measure of compensation" for a leasehold. The value of an unexpired leasehold estate is the fair market value over and above the rental charged, or, in other words, the amount the lessee could expect for an assignment of his lease. *United States* v. *26,699 Acres of Land in Long and McIntosh Counties*, 174 F. 2d 367, 368 (C.A. 5); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 381; *John Hancock Mut. Life Ins. Co.* v. *United States*, 155 F. 2d 977, 978 (C.A. 1), certiorari denied, 329 U.S. 774; see Schmutz, *The Appraisal Process* (1953), par. 3516 at 265. The court of appeals correctly concluded that any valuation of the lessees' or landowner's interest which ignored the unsuccessful efforts to rent the property at annual rentals of 20¢ per square foot was clearly erroneous.[2]

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[2] This case does not present the question whether a court of appeals is to apply the "clearly erroneous" standard to the district court's findings or to those of the commission because in this case the district court adopted the commission's report. It is only when a district court rejects the commission's report that the question of the proper scope of review by the court of appeals arises. Compare *United States* v. *Rainwater*, 325 F. 2d 62 (C.A. 8).

2. The court of appeals agreed with the district court that the Dock Board was not entitled to interest on that portion of the award which represented the United States' vendor's lien. Whether this lien entitled the United States to share immediately in the award or whether such distribution constitutes, as the Dock Board contends, "an indebtedness liquidated before its time" (DB Pet. 39) would be a material issue only if the Dock Board's award exceeded the $9,400,000 lien. Since it is highly probable that on remand the award will be reduced well below this figure, this question may be mooted by the subsequent proceedings. In any event, there is no conflict or any other reason for its consideration at this time.

3. The court of appeals correctly held that any increase in rental which had to be paid by the lessees for their relocated spaces was attributable to the condemnation of this property by the government. Under the rationale of *United States* v. *Cors*, 337 U.S. 325, 333, this increase was "the enhanced price which [the government's] demand alone has created," and it was not, therefore, a permissible consideration in determining the compensation owing to the lessees.

4. The court of appeals additionally held that the commission had erroneously failed to apply the "unit rule" of valuation and had erred in computing the rental award by assessing it at 8 percent of the property's total value. Petitioners' contentions that neither of these errors warranted rejection of the commission's awards (DB. Pet. 31-34) overlook the fact that these were not the primary grounds for reversal. In

effect, the court of appeals instructed the commission that on remand it should apply the preferable "unit rule" and that it should determine fair market rental value by a more precise method than it originally used. These instructions present no question calling for review by this Court.

5. Finally, the lessees contend that the court of appeals should have clarified its mandate and entered judgment for those tenants which had proved that they were entitled "to the benefits of their bargain" (Laclede Pet. 22-23). However, the terms of the mandate would authorize the district court itself to enter judgment for such lessees, if there be any, and there is certainly no reason for this Court or the court of appeals to review the entire record and make this finding of fact—a function which the mandate properly entrusted to the district court.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

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